

**Elisabeth Sugirthamalar Alfred (Administratrix of
the estate of Lilian Nesamalar Alfred) v Tan Jiu See
(t/a JS Tan & Co)**

HIGH COURT (KUALA LUMPUR) — ORIGINATING PETITION NO S5-
24-365(A)-1995
JAMES FOONG J
18 SEPTEMBER 1996

Civil Procedure — Costs — Taxation — Whether costs should be based on party to party costs or on solicitor and client basis — Legal Profession Act 1976 s 126

Civil Procedure — Bill of costs — Taxation — Whether costs should be based on party to party costs or on solicitor and client basis — Legal Profession Act 1976 s 126

The deceased was the vendor of a piece of land ('the land') which she sold to one Adli Ariff Development Sdn Bhd ('Adli'). Under cl 6.03 of the sale and purchase agreement entered into by the parties ('the agreement'), it was stipulated that the deceased shall remove any caveats lodged on the land, in default of which, Adli shall take steps or actions to remove it. In the event of the latter, the deceased shall reimburse the costs and expenses reasonably incurred by Adli. Due to the deceased's death, Adli had to make an application to remove the caveat, which it did. Consequently, Adli claimed against the deceased's estate for reimbursement of the costs it incurred in removing the caveat.

The petitioner was the administratrix of the deceased's estate and the respondent was the solicitor for Adli in the removal of the caveat. The petitioner applied to tax the bill of costs delivered by the respondent. The issue was whether the costs should be based on 'party to party' costs which the petitioner claimed or on a 'solicitor and client' basis as submitted by the respondent.

Held:

Reading cl 6.03 of the agreement in its entirety, it was clear that the purpose and objective of this provision is to reimburse the effort of the purchaser for what the vendor refuses, neglects or unable to do, vis-a-vis the removal of any caveats. This would be tantamount to the purchaser stepping into the shoes of the vendor to carry out the necessary task when the vendor is unable to do so.

In the circumstances of this case, Adli had undertaken the task which was actually the obligation of the vendor. They should therefore be treated on a similar footing as the vendor in proceeding with the necessary actions to remove the caveat. When costs and expenses are incurred for this objective, they should be reimbursed for all expenses as if the vendor would have been charged by her own solicitors for the same job. Therefore, the bill of costs should be taxed on a 'solicitor and client' basis (see p 211D-G).

A [Bahasa Malaysia summary]

Si mati merupakan penjual sebidang tanah ('tanah tersebut') yang dijualkan olehnya kepada Adli Ariff Development Sdn Bhd ('Adli'). Di bawah fasal 6.03 perjanjian jual beli yang diikat oleh pihak-pihak ('perjanjian tersebut'), ia disyaratkan bahawa si mati haruslah membatalkan apa-apa kaveat yang dikemukakan atas tanah, di mana jika ingkar, Adli akan mengambil langkah atau tindakan bagi membatalkannya. Jika yang kedua berlaku, si mati haruslah membayar kos dan belanja yang ditanggung secara munasabah oleh Adli. Akibat kematian si mati, Adli terpaksa membuat permohonan untuk membatalkan kaveat dan ia telah pun berbuat demikian. Berikutnya, Adli menuntut terhadap estet si mati untuk bayaran ganti kos yang ditanggung olehnya dalam membatalkan kaveat.

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Pempetisyen adalah pentadbir estet si mati dan penentang adalah peguamcara Adli dalam pembatalan kaveat. Pempetisyen membuat permohonan agar cukai dikenakan ke atas bil kos yang diserahkan oleh penentang. Isu adalah sama ada kos patut berdasarkan kos 'pihak sama pihak' yang dituntut oleh pempetisyen atau atas dasar 'peguamcara dan klien' seperti yang diujahkan oleh penentang.

E Diputuskan:

Dengan membaca fasal 6.03 perjanjian tersebut secara keseluruhan, adalah jelas bahawa tujuan dan objektif peruntukan ini adalah untuk membayar ganti percubaan pembeli atas apa yang enggan dibuat, tidak dibuat atau tidak dapat dilakukan oleh penjual, berhubung dengan pembatalan sebarang kaveat. Ini adalah seolah pembeli berada dalam kedudukan penjual, melaksanakan tugas yang perlu apabila penjual tidak dapat berbuat begitu.

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Dalam keadaan kes ini, Adli telah menjalankan tugas yang sebenarnya adalah kewajipan penjual. Maka mereka harus dianggap sama seperti penjual dalam meneruskan tindakan yang perlu bagi membatalkan kaveat. Apabila kos dan belanja ditanggung untuk objektif ini, mereka harus dibayar ganti untuk kesemua belanja seperti mana yang dikenakan ke atas penjual oleh peguamcaranya untuk kerja yang sama. Oleh itu, bil kos patut dikenakan cukai atas dasar 'peguamcara dan klien' (lihat ms 211D-G).]

H Notes

For cases on taxation of cost and bill of costs, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1031-1076 and 862-868.

I Legislation referred to

Legal Profession Act 1976 s 126

A Muker (Lovelace & Hastings) for the petitioner.
Andrew Khoo (Khoo & Sidhu) for the respondent.

Cur Adv Vult A

James Foong J: One Lilian Nesamalar Alfred ('the deceased') was the vendor of a piece of property held under CT No 7967 Lot 4 Section 87A, Bandar Kuala Lumpur ('the land'), which she sold to one Adli Ariff Development Sdn Bhd ('Adli') through a sale and purchase agreement in writing dated 27 September 1994 ('the agreement'). B

Under cl 6.03 of the agreement, it is stipulated that the deceased shall be responsible to remove any caveats lodged on the land, and if this was not carried out, Adli shall 'take steps or actions to remove' it. It was further agreed under this same clause that in the event of the latter, 'the vendor [the deceased] shall reimburse the costs and expenses reasonably incurred by the purchaser [Adli]'. C

There was a caveat placed on the land. The deceased could not remove it because she passed away, and probate to her estate was, at that material time, not extracted. This led Adli to make an application to remove the caveat, in which they were successful. D

Probate to the deceased's estate is now granted to the petitioner, and Adli has made a claim for reimbursement from the deceased's estate for the costs of removing the caveat on the land. Pursuant to s 126 of the Legal Profession Act 1976, the petitioner has filed this application to tax a bill of costs delivered by Adli's solicitors, the respondent, claiming the disbursement. There is no dispute between the parties that the bill of costs is to be taxed, but the only issue is whether it should be based on 'party to party' costs — which the petitioner claims — or on 'solicitor and client' basis as submitted by the respondent. E

Party and party cost is 'where a successful party should be indemnified against the necessary expense to which he has been put in prosecuting or defending an action' — 37 *Halsbury's Laws* (4th Ed) para 745. It is normally awarded to a successful party in a suit. As pointed out by Mr Muker, counsel for the petitioner quoting para 62/28/3 of the 1976 White Book, the principles of party and party cost are stated as: F

It is of great importance to litigants who are unsuccessful that they should not be oppressed by having to pay an excessive amount of costs. The costs chargeable under a taxation between the party and party are all that are necessary to enable the adverse party to conduct the litigation, and no more. Any charges merely for conducting litigation more conveniently may be called luxuries, and must be paid by the party incurring them (*Smith v Buller* (1875) LR 19 Eq 475, per Malins V-C ...). G H

Mr Muker further impressed upon this court that what was agreed in cl 6.03 of the agreement is reimbursement of the 'costs and expenses reasonably incurred', and costs based on party and party costs would adequately and sufficiently fulfil the intention of the parties in the agreement. I

Mr Khoo, counsel for the respondent, argued otherwise. He was of the view that solicitor and client costs should prevail. Reimbursement of 'the costs and expenses reasonably incurred by the purchaser' must obviously be in reference to what Adli, the purchaser, has incurred to pay his

A solicitors to remove the caveat. For this, he likened the situation to that of claim by a mortgagee. To support his contention, he quoted a passage from *The Law of Mortgages* by Edward Cousins which is as follows:

B Costs may be allowed to the mortgagee whether he is a plaintiff or a defendant in the litigation. If his title is impeached by the mortgagor, he is fully entitled to be fully reimbursed, so that if he was successful and received costs in the action, he may still recover the difference between the tax costs and his actual costs.

C Solicitor and client costs relates to taxation of a solicitor's bill to his own client, and 'all costs will be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred' — 37 *Halsbury's Laws* (4th Ed) at para 747.

D Reading cl 6.03 of the agreement in its entirety, one would realize that the purpose and objective of this provision is to reimburse the effort of the purchaser for what the vendor refuses, neglects or unable to do, vis-a-vis the removal of any caveats. This would tantamount to the purchaser stepping into the shoes of the vendor to carry out the necessary task when the vendor is unable to do so. In so doing, one should consider what the vendor would have done if she was able to fulfil this obligation. Applying the reasonable man test, the vendor would have to secure the services of a solicitor and when advised, if found necessary, to engage the services of a senior counsel. For these services, she would have to pay and if it is
E opinioned to be on the high side, it would be taxed on a solicitor and client basis.

F In the circumstances of this case, Adli has undertaken the task which was actually the obligation of the vendor. This was not by choice, but forced upon by the then existing situation. They should therefore be treated on a similar footing as the vendor in proceeding with necessary actions to remove the caveat. When costs and expenses are incurred for this objective, they should be reimbursed for all expenses as if the vendor would have been charged by her own solicitors for the same job. For this, this court finds that the bill of costs should be taxed on a solicitor and
G client basis.

H As to the words 'reasonably incurred' in cl 6.03 of the agreement, this court is of the opinion that they were inserted as a reminder that even on party and party costs, it must exclude unreasonable amount or amount that are unreasonably incurred. This is in line with what the law allows for in party and party costs.

I Accordingly, this court hereby orders that the bill of costs in the petition to be taxed on a solicitor and client basis. For this application, there should be no order for costs.

Order accordingly.

Reported by Eugene Lee Hong Whye